In the United States District Court for the Southern District of California,

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FILED
2008 JUN 24 PM 2:49
CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
RM

In Re James Robert Barkacs
V.
D. Adams
Additional Respondent
Deputy Attorney General
Douglas P. Danzig

NO. 07CV2139 JAH(WMC)

Traverse In Reply to Respondents Answer Also memorandum points and authorities In Support therof

James Barkacs pro-se In this matter Hereby asserts Respondent has failed to set forth sufficient facts or law to show cause why the relief requested in the petition should not be granted.

I.

Petitioner is unlawfully in Respondents custody following conviction in San Diego County superior Court case #SCE234361 of one count 1st degree murder, one count carjacking, one count arson and a true finding on a special circumstance allegation That the murder occured during a carjacking. The cause to petitioners unlawful conviction is an indeterminate prison term of life without possibility of parole plus three years.

II.

The Traverse is timely

III.

The anti-terrorism and effective death Penalty Act of 1996 governs this case.

IV.

Petitioner is entitled to federal Habeas Corpus relief on grounds one, Two, Three because 14th amendment due Process is being Violated and because state Court determinations of the merits of the claims were not consistent with controlling precedent and unreasonable.

V.

The memorandum of points and authorities is attached following Petitioners Traverse.

CR

VI.

Petitioner denies each contention and allegation asserted by respondent as too Ground one, Ground two, Ground three. Petitioner re-alleges confinement is illegal and violates the federal constitution. Additionally petitioner re-alleges and incorporates by reference here-in as the allegations and contentions set forth in the petition and set forth in petition for review. Wherefore, petitioner requests that the relief prayed for in the petition be granted.

Date:
June 10, 08

Respectfully submitted,
James Barkocs
James Barkocs

RECEIVED
JUN 16 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

Memorandum Points and Authorities

I.

In ground one I disagree with respondent and re-allege petitioner was denied 14th amendment due process when trial court refused to give defense requested instructions regarding causation and independent intervening acts. The facts of this case are substantially different than people v. Roberts 2 cal. 4th. At p. 311-313 C victum possibly recieved substandard medical ~~attention~~ treatment after being stabbed by defendant and was near death within minutes of stabbing] what differentiates this case from any other case, is that cruz's siblings made an ettrodinary decesion to end his life before he was considered brain dead or before being informed there was no reasonable etpectation that he could recover. Then after being removed from the ventilator, cruz was given large doses of morphine which depressed his ability to breath on his own. This was done despite the fact that cruz didn't have a "do not resuciate" order or any other document indicating his end of life wishes. In short cruz life ended in much the same way as might be decided for an ailing family pet, but which is of questionable legality for a human being. The medical evidence in this case was sufficient enough to establish a reasonable doubt whether petetioners conduct was the legal cause of cruz death. As given all the caljic instructions did not allow expression of that doubt as long as petitioners act was found to be a substantial factor in the "but for" test. The instructions allowed for no unfoorseeable intervening cause to reach a verdict of not guilty. Instructions requested by the defense must be given if the defendants theory of the case is supported by the law and has some foundation in the evidence (U.S. v. Unruh 9th cir) 1988) a criminal defendant is entitled to adequate instructions on the defense theory of the case. Conde v. Henry 9th cir 2000 198 F.3d 734, 739 This right derives from the sixth amendment right to a jury trial (U.S. v. Voss 8th cir 1986) 787 F.2d 393, 398 T

The failure to instruct the jury regarding the defendants theory of the case precludes the jury from considering the defendants defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense if it is believed or if it is believed or if it helps create a reasonable doubt in the jurys mind will entitle the defendant to a judgement of acquittal" U.S. v. Escobar de bright (9th cir 1984) 942 F.2d. 1196, 1200-1201 Proof that a defendants ~~mind~~ conduct was the legal or protimate cause of resulting harm or injury is a well established requirement in a criminal prosecution (U.S. v. Spinney 9th cir 1986) 795 F.2d. 1410, 1415 In the present case ~~between~~ the connection between petitioners conduct and death of Pablo cruz depends upon a chain of events, the standard instructions do not adequately convey the concepts of intervening and supervening causes The ommission of any reference to independent causation has the effect of misstating the law For example caljic 8.57 states the accepted proposition that negligent medical care that aggravates the injury intially inflicted does not relieve the original injurer of responsibility of the orginal injuries. The instructions fails to state the rationale for this rule of law which is that ordinary medical negligence is a foorseeable result of seeking medical attention a fact petitioner reconizes. People v. McGee 1947 31 cal. 2d. 229, 240 Lafave & scott 5.35 259) Since the instruction doesn't state the rationale for this Rule of law. It is mpossible for a juror to infer from it the converse but legally correct proposition That grossly negligent or intentional medical malpractice ir a highly questionable decesion by family to end a persons life when the individual is not brain dead or even diagnosed as being in a persistent vegative state, is an independent intervening cause of death which relieves the orginal of liability for the aggravated injury or death. That converse proposition is the law in california People v. McGee supra Lafave & scott. The jury was not instructed according to that law. no instructions in this case conveyed this aspect of the law and the instructions given conveyed a Contrary Rule. For the reasons stated petitioners 14th amendment was violated.

II.

In ground two I disagree with respondent and re-allege that 14th amendment due process was violated. The 6th amendment guarantees a defendant a right to a fair trial, which includes an impartial Jury capable and willing to decide the case solely on the evidence before it. Fields v. Brown 503 F.3d 755, 766 9th cir 2000) citing McDonough Power Equipment, Inc v. Greenwood 464 u.s. 548, 554, (1984) voir dire protects that right by exposing possible bias by the Juror. when a Juror bias actual bias is discovered in the midst of trial, that juror is subject to discharge. People v. nestler 16 cal. 4th cal. App. p. 581 People v. Keenan (1988) 46 cal. 3d. 478, 532. code of civil procedure section 229 permits a challenge for cause for any Juror "having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them" The existence of a state of mind in the Juror evincing enmity against or bias towards either party" code civ. proc 229 subs (d)(f) Juror 5 withheld information about her extensive law enforcement contacts. If admission of such contacts would not have subjected her to a challenge for cause during voir dire, her concealment rose to that level during trial. Even more significant by ommitting such clearly relevant information, The Juror deprived petitioner of the right to exercise a peremptory challenge. This in itself impinged on petitioners right to due process. The ninth circuit has held that The denial of the number of peremptory challenges authorized by state law violated federal due process as an arbitrary deprivation of a state created liberty vansickel v. white 9th cir 1999) 166 F.3d. 953 citing Hicks v. oklahoma 447 u.s. 343, 346. It would be apparent to even a causual observer that Juror 5 withheld information during voir dire. Juror 5 explains her relationship of MR. Ross and his wife in the context of "co members" as she explains her other law enforcement contacts. Juror 5 states she has not done anything "causually" with mr Ross wife. now on the third day of trial the prosecuter ~~explained~~ informed the court that another Prosecutor had informed him he was in the same Rotary club as Juror 5 (RT 403) This prosecutor considered Juror 5 to be a close acquaintence. When the court asked why Juror 5 didn't disclose that when earlier asked if she knew anyone in law enforcement or who worked for a prosecutors office. Juror 5 - she thought the question pertained to someone she knew or socialized with. Juror 5 expressed she didn't know him "personally" and mentioned a few other law enforcement contacts and described their relationships as "co members" rather than friends. In the same context as she describes mr. Ross and his wife. Respondent only makes it clearer and more obvious That Juror 5 withheld information either intentially or unintentially. petetioner would certainly have excused Juror 5 if I had been privy to the extent of her law enforement contacts. There can be no doubt I was deprived of a right to exercise a ~~peremptory~~ challenges against Juror 5. The simple solution would have been to replace her with an alternate a remedy the trial court refused erroneously to consider. 14th amendment due process was violated.

III

I disagree with respondent and re-allege The Trial Court erroneously allowed the prosecutor to Imply that petitioner or his family threatened a witness and the error prejudicially violated petitioners right to due process. Evidence that a defendant is threatning a witness implies conciousness of guilt and Thus is highly prejudicial and admissible only if adequately substantiated. People v. warren (1988) 45 cal. 3d. 471, 481 citing People v. Hannon (1977) 19 cal. 3d., 588, 600 In this case there was no evidence petitioner or his family threatened Calvin Pete, or that he was in danger of "retaliation" as implied by the prosecutor. The question alone and the overruled objection by the trial court was an insidiousness implication that petitioner and his family were dangerous people who could harm pete if he testified truthfully. In Dudley v. Duckworth 854. F. 2d. at. p. 969-970

People v. Warren (1988) 45 cal. 3d. 471, 481 Citing People v. Hannon (1977) 19 cal. 3d. 588, 600 In this case there was no evidence petitioner or his family threatened Calvin Pete, or that he was in danger of "retaliation" as implied by the prosecutor. The question alone, and the overruled objection by the trial court was an insidious implication that petitioner and his family were dangerous people who could harm pete if he testified truthfully. In Dudley v. Duckworth, 854 F. 2d. at pp. 969-970 The prosecutor called a witness who agreed to testify in exchange for a reduced sentence. After a few preliminary questions, the prosecutor into a line of questioning about anonymous and threatning phone calls that the witness recieved the night before and that made him nervous. The trial court denied a motion for a mistrial and the state courts affirmed. In adjucating Dudleys habeus corpus the Seventh Circuit stated. This record suggests to us the strong possibility that the prosecutor intended to get the threat of testimony before the jury under a pretext...... The record strongly suggests that the evidence of threats was intended more to prejudice the defendant than to explain away any nervousness of the ~~defendants~~ witness. we believe that more was at issue in the present case than a mere abuse of discretion as found by the state supreme court. The admission of threat testimony could not but deprive petitioner of his right to present a ~~jury~~ defense to a jury free from 'evidential harpoons' we find the error amounts to a violation of petitioners 14th amendment right. As in Dudley, no limiting instruction was given in this case. more importantly it is clear the prosecutors intent was not simply to explain Calvin petes reluctance to testify, but to actually and improperly imply that his fear was related to petitioner rather than the understandable reluctance to testify against a friend as well as implicate himself in criminal wrong doing

The deliberate and inflamatory question was a violation of petitioners Fourtenth amendment rights.

United States District Court Southern District
OF CALIFORNIA

James Robert Barkacs #V75306
V.
case number: 3:07-cv-02139JAH-WMC
Warden: D. Adams
Deputy Attorney Attorney General Douglas P. Danzig

I hereby certify that on June 10, 08, I Served a Copy of the attached Reply To The answer by Placing a copy in a postage paid envelope adressed to the persons hereinafter listed by depositing said envelope in the united States mail at CSP Corcoran State prison Kings county, california

I served a Handwritted Copy TO The Deputy Attorney General Douglas P. Danzig
no adress given
And Too:
Honorable. William McCurine, JR.
U.S. Magistrate Judge
United States District Court
Southern District of california
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